

# **A CROWDED SHORELINE**

## **Review of the Philippines' Foreshore and Shore Land Management Policies**

By Jay L. Batongbakal

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# **A Crowded Shoreline: Review of the Philippines' Foreshore and Shore Land Management Policies**

By Jay L. Batongbakal<sup>1</sup>

## **1.0 INTRODUCTION**

Since the 1980s, practically all coastal resource management projects in the Philippines have concentrated on fisheries management and habitat restoration and protection as the main focus of concern. This is on account of the fact that such projects have usually been entirely or partly motivated by the need to contribute to the alleviation of poverty and upliftment of living conditions of the marginalized sectors inhabiting coastal communities. Because of this special focus, efforts have been channeled towards activities that would assist these sectors ensure the satisfactory food supply and income from their coastal use activities.

The foreshore is a part of the coast; it divides the land and the sea. The term "foreshore" is a legally-accepted term under Philippine law denoting the strip of land that is covered and uncovered by the movement of the tides of the sea.<sup>2</sup> The latest legal definition is that used in the Fisheries Code,<sup>3</sup> which defines the term in Section 4, paragraph 46 as follows:

*Foreshore Land* — a string of land margining a body of water; the part of a seashore between the low water line usually at the seaward margin of a low tide terrace and the upper limit of wave wash at high tide usually marked by a beach scarp or berm.

Any discussion of foreshore management inevitably leads to consideration of the intimate relationship between the foreshore and the dry "shore." The definition of the term "shore," however, is admittedly somewhat more elusive. In earlier Philippine laws, as well as in other countries, the word "shore" is synonymous with the "foreshore."<sup>4</sup> However, subsequently both the Civil Code and the Water Code<sup>5</sup> referred to the "shores" as subject to certain easements and zones which were clearly intended for the dry land beyond the high water line, and thus for this paper will be referred to as such. Unlike the foreshore, which is always considered as public domain, however, the shore may include private lands and may also be classified as other types of land in accordance with the land and forestry laws of the country. Likewise, other than the easements provided in the Water

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<sup>2</sup> This term and definition has been in use since the 1930's. Prior to that time, this area was simply referred to as the "shore" in Article 1, paragraph 3 of the Spanish Law of Waters of 1866. Commonwealth Act No. 141 (1936), otherwise known as The Public Land Act, referred to the "foreshore" in Section 59.

<sup>3</sup> Rep. Act No. 8550 (1998), "The Fisheries Code of 1998."

<sup>4</sup> See for example, Article 1(3) of the Spanish Law of Waters of 1866, some portions of which are recognized by the Philippine Supreme Court to be still in force to this day. Likewise, see Black's Law Dictionary (1979 ed.), p. 1236.

<sup>5</sup> Pres. Decree No. 1067 (1976), "The Water Code"

Code, the shore is not subject to the same rules as the foreshore. This distinction shall be explained fully in the subsequent discussion.

Issues regarding the foreshore have commonly been viewed as merely incidental to or necessarily connected with the other coastal activities. For example, urbanization or industrialization along the shores, or perhaps mariculture and aquaculture, have usually created associated impacts. As coastal resource management projects have focused primarily on either living resources or their habitats, the foreshore itself has been taken for granted as being part and parcel of the adjacent land or water. It does not appear to have itself been the subject of direct inquiry. Thus, management of foreshore specifically as a coastal space with specific requirements and purposes has not been highlighted as a particular concern in previous coastal resource management studies.

This paper was commissioned by the Coastal Resource Management Project on account of an emerging awareness, arising from feedback from pilot sites for coastal resource management, that foreshore management is in fact a major problem area that needs to be addressed. The purpose of the study is to revisit Philippine policies on the foreshore and the adjacent dry shores, and explain fully the current status of the law on their use and management. Although it began as a study of the foreshore area alone, the inextricable connection between issues on the foreshore and the adjacent shore necessitate the consideration of both areas as one unit, which for the purpose of this study may simply be called the "shore lands." It will elaborate on special issues and problems that have been found to exist, based on field visits of the several municipalities in Southern Cebu, and compare them with the current state of the law and policy. Afterwards, recommendations will be made on how best to address these problems and issues, and hopefully point the way toward avoiding more complicated problems in foreshore management.

## **2.0 CURRENT ISSUES AND PROBLEMS IN FORESHORE AND SHORE LAND MANAGEMENT**

The overall problem with the foreshore and shore land areas can be seen in terms of uncontrolled coastal development; the utilization of the coastline areas is being undertaken at a very rapid pace and in a haphazard manner. Based on the field visit conducted in Southern Cebu from August 10 to 11, 2001, this can be further broken down into typical problems and issues that may be classified into 6 major categories:

*Classification* – issues due to the grey areas in the law caused by the inadequacy of land classification categories

*Access* – problems of coastal structures impeding public access to or within the foreshore and shore lands

*Resource Use* – problems on account of improper exploitation of material resources in the foreshore and shore lands

*Public Safety* – problems created by natural coastal processes impacting on coastal uses

*Shoreline Management* – unauthorized and improper shoreline management measures being undertaken by private persons

*Regulatory Processes* – grey areas in the jurisdictions and mandates of government agencies with interest in the foreshore and shore land areas

These issues and problems are largely intertwined, and arise basically from the inconsistency between the management activities and policies over the foreshore and the shore lands, failure or lack of exercise of jurisdiction on the part of the concerned government agency, and lack of dissemination of information to the public at large.

## 2.1 Classification Issues

Classification issues arise where the relative positions of the foreshore, adjacent shore lands, and presence of public forests or infrastructure, make it difficult to properly classify the land areas in consonance with the requirements of the law. The classification of the land determines the applicable regulatory measures and relevant agency responsible.

The prime example of this problem is where the land on the shoreline ends abruptly in the form of a cliff edge, and there is no area of water covered and uncovered by the flow and ebb of the tides. Legally, therefore there is no foreshore, and the management of the land on the cliff slope is not subject to rules on the foreshore.

Another issue, which is common, is due to the existence of coastal roads or highways built by the government close to the edge of the shore. It may be located within the setback zone described by the Water Code, and at the same time a 10-meter easement on either side of the road is created. Questions arise as to the status of the land between the road and the edge of the shore, especially if the width of that strip of land is less than the salvage zone required by law.

Yet another issue arises with respect to mangroves, which are necessarily located within the foreshore areas. Mangrove is classified as public forests under the Forestry Code.<sup>6</sup> Since mangrove stands are never very orderly in terms of shape and never consistently distribution along the shoreline, the irregular patches of mangrove and empty foreshore creates gaps in the applicable management rules. Mangroves are subject to management as public forest areas, while the empty foreshore may disposed of by lease to private persons. Consistency of management measures and interventions also becomes an issue, since the mangrove stands cannot be managed completely separately from the foreshore land on which it is located.

## 2.2 Access

Access issues arise from the construction of permanent structures either on the adjacent shore lands, or in the foreshore area itself. Privately-owned structures built on leased shore lands are frequently surrounded by fences which enclose the coastal area and may

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<sup>6</sup> Pres. Decree No. 705 (1975), "The Revised Forestry Code of 1975."

block direct public access to the shore from the areas farther inland. The fences slowly begin to form a solid and continuous obstruction down the length of the coastline.

In addition to fences preventing access from the inland to the water, private individuals and corporations have built jetties, wharves, revetments, seawalls, retaining walls, causeways, or even fences per se, to prevent open public access along the beach or foreshore area covered by the Foreshore Lease Contract (FLC). These structures extend from the dry shore land and out to the water of the sea. It is not uncommon to find foreshore lessees fencing off the area covered by their lease contracts and preventing the public from passing through; this is specially the case with beach resorts.

### **2.3 Resource Use**

Physical removal of the foreshore itself is taking place in some areas. White sand and gravel are commonly extracted from the beaches and foreshore areas to be sold for construction purposes or as gardening material. This accelerates the rate of coastal erosion. The extraction is undertaken by private persons and companies with quarrying permits issued by the provincial governor pursuant to the Mining Code.<sup>7</sup>

There is also a problem with ancillary structures, particularly for users of the offshore for fishing. In the case of permits for the construction of fish cages and traps, the licensees assume that their fishing license or authorization automatically includes permission to build any necessary structure (whether permanent or semi-permanent) on the foreshore without further review or accountability to any other agency of government. Fishery licenses and permits are issued by the local governments pursuant to the Fisheries Code.<sup>8</sup>

### **2.4 Public Safety**

The nature of the structures that are built on the foreshore and shore lands create public safety issues for the long term.

Privately-owned structures standing on the extremely narrow strips of land or cliff-faces between coastal roads/highways and the foreshore, or actually on the narrow foreshore, are subject to dangers of coastal erosion. Erosion happens at both a steady rate on a day-to-day basis, but can also suddenly intensify with storm activity. Residential structures may collapse without warning at any time coastal erosion sufficiently undermines the foundations on which these structures stand.

Even uninhabited structures create public safety issues. Privately-constructed seawalls, revetments, jetties, causeways, etc. are actually accelerating coastal erosion, which in many areas was noted to have already caused damages to coastal roads/highways. Most people are under the mistaken assumption that these structures help retain the beach sand and coastal frontage; but in fact, empirical evidence has proven that they actually accelerate coastal erosion by magnifying the effect of the waves and focusing them on the location of the structures.

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<sup>7</sup> Sec. 43, Rep. Act No. 7942 (19995), "The Philippine Mining Act of 1995."

<sup>8</sup> Sec. 16, The Philippine Fisheries Code of 1998.

## 2.5 Riparian Rights

Regulation of the activities of the adjacent or riparian owners was seen as another issue. Owners of the lands adjacent to the foreshore are allowed by law to exercise preferential rights to the disposition of the foreshore. However, it was noted that a number would exercise such right to gain possession and control of the area adjacent to their property, after which they would lease the same to other persons who no longer deal with the government directly.

## 2.6 Shoreline Management

Shoreline management issues arise from the fact that there is no central or consistent management plan, which guides the use or transformation of the character of the shoreline. It was noted that private persons are undertaking their own personal reclamation of the foreshore area for residential purposes, with the ultimate purpose of acquiring title over the reclaimed area. First, the foreshore is segregated with jetties, then closed off with revetments; afterwards the enclosed areas are filled with rocks and soil, and structures are built over them. In other areas, fishponds are converted to residential uses.

Private persons are also constructing personal jetties, wharves, causeways, revetments, and seawalls, which are accelerating the erosion of the shoreline. These structures are not being regulated by the local governments, since the foreshore areas are under the jurisdiction of the DENR, while the structures are presumed to be under the jurisdiction of the Department of Public Works and Highways.

## 2.7 Regulatory Processes

The fragmentation of regulatory jurisdictions over the foreshore and shore land areas has commonly led to the absence of proper regulation. It has also led to the absence of clear processes and procedures by which the agencies involved can coordinate their activities to effectively manage the shore areas.

Thus, local government units are unaware of the extent of their powers to regulate, or at least influence the regulation of, the foreshore and shore lands. They are uncertain of their roles in the processing of applications for FLCs, as the rules and procedures do not require action on the part of the local government units. Local government units seek clarity as to the range of regulatory options available to them in order to address the problems and issues encountered with existing coastal structures and activities, as well as those expected in the future under pending FLC applications.

The DENR likewise has uncertainties with respect to the appropriate management mechanism for the activities of the foreshore lessee. The Environmental Impact Statement System could be used for regulating all types of structures and activities on the foreshore

and adjacent shore, but this is not undertaken since the foreshore and shore lands are not included in the list of projects and activities subject to EIA unless they are included within tourist zones or mangrove stands.<sup>9</sup>

It also appears that the DENR has been issuing provisional permits, allowing the FLC applicant to enter, occupy, and use the foreshore area subject of the application, even though the application is still pending. But the permits for the structures in the foreshore area are not secured from the DENR, but rather from the DPWH.

The disorganized manner in which the foreshore and shore lands are currently being used, and the apparent lack of a clear authority to take control and coordinate the regulation thereof, has caused some quarters to seek relief through some type of national arrangement clearly placing an area under one responsible authority or management plan. In one instance, one municipality has requested that a beach area be declared a municipal reserve in order to prevent its being overrun by tourist cottages; another proposal has been to make an area containing mangrove stands to be declared a NIPAS site; and yet another seeks a classification of a place as a "public beach."

One specific problem that needs to be addressed is the identification of the proper agency to implement the provisions of the Water Code, particularly the provision for a salvage zone, as well as the agency to enforce all other easements in favor of the public with respect to the foreshore and shore land areas. The Water Code is supposed to be implemented by the National Water Resources Council,<sup>10</sup> but this agency is unknown to most people and even some government agencies.

### **3.0 FORESHORE AND SHORE LANDS IN PHILIPPINE LAW AND POLICY**

#### **3.1 History of Legislation for the Foreshore**

Of all legislation in the Philippines, land laws are among the most anachronistic and fragmented. On account of the many varied activities taking place on the land, land management policies are among the more difficult to grapple with since the pertinent laws and policies are scattered over a wide body of laws and extended span of time. Laws on the foreshore are no exception to this, as the relevant provisions need to be culled from assorted legislation, including four (4) major codes, enacted within a span of some one hundred and forty (140) years. But an additional factor that makes foreshore legislation more difficult to contend with is the fact that, in such sparse legislation, the legal rules on foreshore management are even fewer still.

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<sup>9</sup> Proc. No. 2146 (1981), entitled "Proclaiming Certain Areas and Types of Projects as Environmentally Critical and Within the Scope of the Environmental Impact Statement System Established under Pres. Decree No. 1586

<sup>10</sup> Art. 79, The Water Code, in relation to Pres. Decree No. 424 (1974), entitled "Creating a National Water Resources Council, Reconstituting its Membership, Vesting the Same with Powers to Coordinate and Integrate Water Resources Development, and Providing Funds Therefor."

### 3.1.1 The Spanish Law of Waters of 1866

The Spanish Law of Waters was enacted by Spanish Royal Decree in 1866, and since that time has been amended and superseded a number of times in Spain, and yet some parts of it are still in effect in the Philippines. As late as the 1997 and 1998, the Supreme Court, in the cases of *Republic of the Philippines vs. Court of Appeals and Josefina Morato, et. al.*<sup>11</sup> and *Republic of the Philippines vs. Court of Appeals and Republic Real Estate, Inc., et. al.*<sup>12</sup> had to resort to its remaining provisions in order to resolve issues pertaining to rights claimed over foreshore areas.

While subsequent laws have extensively modified certain specific aspects of the provisions of the Spanish Law of Waters, much of these provisions and the principles behind them remain in force on account of the lack of specific repealing provisions or total inconsistency with later laws. In summary, among the basic rules contained in the Spanish Law of Waters which remain in force today are:

Lands adjacent to the sea or the foreshore are subject to easements of salvage and coast police;<sup>13</sup>

Such easements do not hinder the owners of such properties from growing crops and planting trees;<sup>14</sup>

The use of the foreshore is a public right, and any person may make use of the resources therein;<sup>15</sup>

Any such rights exercised over the foreshore or its resources may be revoked or rescinded in the interest of common public good;<sup>16</sup>

The construction of permanent structures in the foreshore or adjacent property is subject to state regulation.<sup>17</sup>

The easement of salvage pertains to the right of the public to make use of the area within a specified zone, in case of shipwrecks in the adjacent sea areas, to salvage and deposit the said shipwreck's remnants, effects, and cargoes, as well as for fishing boats to make use of the area for grounding and temporary sheltering in case of bad weather. This area advances or recedes with the sea and is always adjacent to the foreshore.<sup>18</sup>

On the other hand, the easement of coast police obligates the owner of adjacent property to leave clear a right of way, not exceeding six (6) meters, across the property and adjacent to the coastline; this right of way extends through fenced property as well as

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<sup>11</sup> Supreme Court G.R. No. 100709, November 14, 1997

<sup>12</sup> Supreme Court G.R. No. 103882, November 25, 1998

<sup>13</sup> Art. 8, Spanish Law of Waters of 1866

<sup>14</sup> Art. 11, Id.

<sup>15</sup> Art. 17, Id.

<sup>16</sup> Art. 21, Id.

<sup>17</sup> Art. 22, Id.

<sup>18</sup> Art. 9, Id.

open country.<sup>19</sup> The purpose of this easement is clearly to ensure public access across the coastal zone.

Subsequent legislation, such as the Civil Code and Water Code, supplemented or modified the other provisions of the Spanish Law of Waters, and shall be discussed subsequently.

### 3.1.2 The Public Land Act

The Public Land Act<sup>20</sup> was enacted in 1936, and is the law governing the management and use of lands of the public domain. Such lands include the foreshore areas. However, despite the repeated amendment and modification of The Public Land Act throughout the years of its existence, the provision specifically dealing with the foreshore area has barely been touched.

Foreshore lands may be considered as disposable under the Public Land Act,<sup>21</sup> and opened to disposition or concession according to the terms and conditions under Title III, Chapter VIII of the said law.<sup>22</sup> However, the only mode of disposition allowed is through lease, after the foreshore has been expressly declared as disposable,<sup>23</sup> and thus the State retains title and ownership to such areas regardless. The foreshore may be alienated, encumbered, or otherwise disposed of by the State only through a legislative act.<sup>24</sup>

Up to a maximum of one hundred and forty-four (144) hectares may be leased to any private person or corporation qualified to purchase or lease public lands for agriculture purposes under the Constitution, but this limitation does not apply to grants, donations, or transfers made to local governments or any branch or subdivision of the Government if such is necessary for a public purpose.<sup>25</sup> The leasing of the foreshore is subject to public bidding procedures prescribed by Sec. 67, which provides for oral bidding, or sealed bidding in case improvements have already been made.

Leases of the foreshore are subject to the following mandatory conditions:<sup>26</sup>

The rental shall not be less than three per centum (3%) of the appraised or reappraised value of the land plus one per centum (1%) of the appraised or reappraised value of the improvements, except for lands reclaimed by the Government which shall not be less than four per centum (4%) of the appraised or reappraised value of the land plus two per centum (2%) of the appraised or reappraised value of the improvements;

The land rented and the improvements thereon shall be reappraised every ten years if the term of the lease is in excess of that period.

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<sup>19</sup> Art. 10, Id.

<sup>20</sup> Commonwealth Act No. 141 (1936), "The Public Land Act"

<sup>21</sup> Sec. 59, The Public Land Act

<sup>22</sup> Sec. 58, Id.

<sup>23</sup> Sec. 61, Id.

<sup>24</sup> Ibid.

<sup>25</sup> Sec. 60, Id.

<sup>26</sup> Art. 64, Id.

The term of the lease shall be not more than twenty-five (25) years, although renewable for another twenty-five (25) years;<sup>27</sup>

The lessee shall construct permanent improvements appropriate for the purpose for which the lease is granted, shall commence the construction thereof within six (6) months from the date of the award of the right to lease the land, and shall complete the said construction within eighteen (18) months from said date;

At the expiration of the lease or of any extension of the same, all improvements made by the lessee, his heirs, executors, administrators, successors, or assigns shall become the property of the Government;

The regulation of all rates and fees charged to the public; and the annual submission to the Government for approval of all tariffs of such rates and fees;

The continuance of the easements of the coast police and other easements reserved by existing law or by any laws hereafter enacted;

Subjection to all easements and other rights acquired by the owners of lands bordering upon the foreshore or marshy land.

Violation of any of the above terms and conditions is a ground for rescission of the lease contract, upon the instance of the government, now through the Department of Environment and Natural Resources. However in case the violation pertains to the failure to construct the improvements within the prescribed period, the government may allow the lessee and extension of time.<sup>28</sup> Incidentally, all improvements are subject to the regulation of the government,<sup>29</sup> at present this function is lodged in the Department of Public Works and Highways.

It appears that regardless of whether or not a lease has been granted, the government may grant temporary use of the foreshore to any qualified person upon payment of a reasonable charge, which permission is revocable at any time should public interest require it.<sup>30</sup>

No disposition of any public land (whether by lease or sale) shall be granted if such will injuriously affect the use of the adjacent land, waters, or the foreshore; nor will such disposition vest in the grantee any valuable rights that may be detrimental to the public interest.<sup>31</sup>

### 3.1.3 The Civil Code

The year 1949 saw the approval of the Civil Code of the Philippines<sup>32</sup> that contains, among others, some basic rules on property and its uses. Generally, the banks and shores of the

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<sup>27</sup> Art. 64 in relation to Art. 38, Id.

<sup>28</sup> Ibid.

<sup>29</sup> Sec. 66, Id.

<sup>30</sup> Sec. 68, Id.

<sup>31</sup> Sec. 109, Id.

<sup>32</sup> Rep. Act No. 386 (1949), "The Civil Code"

sea (undoubtedly including the foreshore though different terms are used) are classified as property of public dominion,<sup>33</sup> which means that they cannot be alienated or leased or otherwise be the subject matter of contracts.<sup>34</sup> However, it also stated that when no longer intended for public use, such property shall form part of the patrimonial property of the State,<sup>35</sup> which changes the character of the property to one subject of disposition by the State and appropriation by private persons through the modes permitted by law. Property of the public dominion is deemed no longer intended for public use when they are declared to be alienable and disposable.

When private property is "invaded" by the sea and is subjected to the tides, such that it becomes foreshore land, such property passes into the public domain.<sup>36</sup> It remains public domain even if subsequent reclamation by the government causes the property to resurface.<sup>37</sup>

### 3.1.4 The Fisheries Code of 1998

Several decades passed before the foreshore specifically became subject of a new provision of law. Section 45 of the Fisheries Code of 1998<sup>38</sup> lays down the general rule that beginning in 1998, public lands such as tidal swamps, mangroves, marshes, foreshore lands, and ponds suitable for fishery operations shall not be disposed of or alienated.<sup>39</sup> Normally, the terms "shall not be disposed of or alienated" include all forms of disposition, including by lease agreement. But, it appears that one form of disposition is permitted by the same section, which is through fishpond lease agreement in favor of fisherfolk cooperatives and associations.<sup>40</sup>

It may be argued that these provisions have impliedly repealed the provisions of the Public Land Act on foreshore lease agreements. Since fishpond lease agreements are governed by sections 45 to 56 of the Fisheries Code, all other forms of disposition in favor of private persons, and all purposes other than for fishponds, are impliedly no longer permitted. Under the present state of the law, foreshore lands are presently subject to only two types

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<sup>33</sup> Art. 420, para. 1, The Civil Code

<sup>34</sup> Tolentino, A. Commentaries and Jurisprudence on the Civil Code, Vol. 2 (1987 ed.), Central Lawbook Supply, Inc., Manila, at pp. 29-30.

<sup>35</sup> Art. 422, The Civil Code

<sup>36</sup> Republic of the Philippines vs. Court of Appeals, et. al., G.R. No. 100709, November 14, 1997.

<sup>37</sup> Government vs. Cabangis, 53 Phil 112

<sup>38</sup> The full text of Sec. 45 of the Philippine Fisheries Code of 1998 states:

"SECTION 45. Disposition of Public Lands for Fishery Purposes. — Public lands such as tidal swamps, mangroves, marshes, foreshore lands and ponds suitable for fishery operations shall not be disposed or alienated. Upon effectivity of this Code, FLA may be issued for public lands that may be declared available for fishpond development primarily to qualified fisherfolk cooperatives/associations: Provided, however, That upon the expiration of existing FLAs the current lessees shall be given priority and be entitled to an extension of twenty-five (25) years in the utilization of their respective leased areas. Thereafter, such FLAs shall be granted to any Filipino citizen with preference primarily to qualified fisherfolk cooperatives/associations as well as small and medium enterprises as defined under Republic Act No. 8289: Provided, further, That the Department shall declare as reservation, portions of available public lands certified as suitable for fishpond purposes for fish sanctuary, conservation, and ecological purposes: Provided, finally, That two (2) years after the approval of this Act, no fish pens or fish cages or fish traps shall be allowed in lakes."

<sup>39</sup> Sec. 45, *Id.*

<sup>40</sup> *Ibid.*

of uses by the national government under the Fisheries Code of 1998. The first is as reservations for fish sanctuary, conservation, and ecological purposes,<sup>41</sup> and the second is mangrove cultivation areas to strengthen the habitat and spawning ground of fish.<sup>42</sup> In both cases, the Department of Agriculture is the agency responsible for designation of the foreshore lands as such reserves or sanctuaries.

### 3.2 Non-specific Legislation Directly Impacting on the Foreshore

The key to completely understanding what is happening to foreshore management in the Philippines is to look not at the foreshore exclusively, but to view it in the context of existing rules on two major subjects, (a) the adjacent shore land and (b) land reclamation.

#### 3.2.1 Legislation on Adjacent Shore Lands

Commencing from the high water line is the marginal area which, for lack of better legal terminology, is referred to in this study as the "shore lands." This area includes what other countries classify as the sandy "backshore" that usually forms the dry beach, extending from the high water line to the top soil or rocky terrain of the "coastal upland" where the soil consistency or terrain characteristics begin to be consistent with the average soil type and terrain of the rest of the land mass. The shore lands are basically ordinary parcels of land that are subject to the same kinds of classification as every other parcel of dry land in the country. They may be forest lands, residential, commercial, or agricultural in nature; they can also be either of public or private ownership.

The most important rule governing the shore lands adjacent to the foreshore is the Water Code,<sup>43</sup> which provides:

"ARTICLE 51. The banks of rivers and streams and the shores of the seas and lakes throughout their entire length and within a zone of three (3) meters in urban areas, twenty (20) meters in agricultural areas and forty (40) meters in forest areas, along their margins are subject to the easement of public use in the interest of recreation, navigation, floatage, fishing and salvage. No person shall be allowed to stay in this zone longer than what is necessary for recreation, navigation, floatage, fishing or salvage or to build structures of any kind.

Similar zones are used in other countries for regulating the use of their coastal frontage and are often referred to as "setback" zones, intended to preserve public access. However, no special or individual right to access is given specifically to the owners of adjacent properties; in the absence of special permission or license, the private owner of upland

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<sup>41</sup> Ibid.

<sup>42</sup> Sec. 81, Id. At least 25% but not more than 40% of foreshore lands may be set aside for mangrove cultivation purposes.

<sup>43</sup> Pres. Decree No. 1067 (1976)

adjacent to the shore has no greater right than any other individual to the use of the shore.<sup>44</sup>

The actual use of the shore lands is subject to shared jurisdiction between two major agencies of government, (a) the local government units in which the shore lands are located, and (b) the Housing and Land Use Regulatory Board.

Local government units, specially the municipalities and cities, may exercise control over the use of shore lands through a number of inherent and directly-relevant powers, namely the powers to:

reclassify agricultural lands<sup>45</sup> (where such shore lands are devoted to agricultural use), adopt a comprehensive land use plan<sup>46</sup> in consonance with the approved provincial comprehensive land use plan,<sup>47</sup>

enact integrated zoning ordinances in consonance with that comprehensive land use plan,<sup>48</sup>

process and approve subdivision plans for residential, commercial, industrial, or other development purposes,<sup>49</sup>

regulate activities relative to the use of land, buildings, and structures within the municipality in order to promote the general welfare,<sup>50</sup>

regulate in particular the establishment, operation and maintenance of cafes, restaurants, beerhouses, hotels, motels, inns, pension houses, lodging houses and other similar establishments,<sup>51</sup>

provide for the establishment, maintenance, protection, and conservation of communal forests and watersheds, tree parks, greenbelts, mangroves, and other similar forest development projects (where the shore has such characteristics),<sup>52</sup>

authorize the establishment, maintenance, and operation of ferries, wharves, and other structures, and marine and seashore or offshore activities intended to accelerate productivity,<sup>53</sup>

regulate the use of public places, which by nature include the foreshore areas considering that they are considered property of the public domain,<sup>54</sup>

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<sup>44</sup> Kock Wing vs. Philippine Railway Company, G.R No. 31662, February 14, 1930.

<sup>45</sup> Sec. 20, Rep. Act No. 7160 (1991), "The Local Government Code of 1991."

<sup>46</sup> Sec. 447(b)(2)(vii) in the case of municipalities, and Sec. 457(2)(vii) in the case of cities, Local Government Code of 1991.

<sup>47</sup> Sec. 468(a)(2)(viii), The Local Government Code of 1991.

<sup>48</sup> Sec. 447(a)(2)(i), Sec. 458(a)(2)(i), Id.

<sup>49</sup> Sec. 447(a)(2)(x) and 458(a)(2)(x), Id.

<sup>50</sup> Sec. 447(a)(4) and 458(a)(4), Id.

<sup>51</sup> Sec. 447(a)(4)(iv) and 458(a)(4)(iv), Id.

<sup>52</sup> Sec. 447(a)(5)(i) and 458(a)(5)(i), Id.

<sup>53</sup> Sec. 447(a)(5)(iii) and 458(a)(5)(iii), Id.

<sup>54</sup> Sec. 447(a)(5)(v) and 458(a)(5)(v), Id.

In addition, the local governments may exercise related powers such as the power to protect the environment and impose penalties for acts which endanger the environment;<sup>55</sup> to prescribe reasonable limits and restraints on the use of property within the jurisdiction of the municipality;<sup>56</sup> and to regulate any business, occupation or profession within the municipality and the conditions under which the license for said business or practice may be issued or revoked.<sup>57</sup>

On the basis of the foregoing regulatory powers, local government units are indeed the primary regulators of the use of the shore lands and by implication the adjacent foreshore areas.

The powers and jurisdiction shared by local government units with the Housing and Land Use Regulatory Board (HLURB) arises from the mandate of the HLURB inherited from the defunct Ministry of Human Settlements.<sup>58</sup> The HLURB is tasked with the promulgation of zoning and land use standards and guidelines that govern land use plans and zoning ordinances of local government units;<sup>59</sup> and to review, evaluate and approve or disapprove comprehensive land use development plans and zoning ordinances.<sup>60</sup> It should also be noted that the HLURB's approved land use plans and zoning ordinances prevail over any classification of the lands that may have been undertaken by the Bureau of Lands of the Department of Environment and Natural Resources.<sup>61</sup> This means that the Bureau of Lands cannot declare lands as alienable and disposable in a manner that is inconsistent with the land use plan or zoning ordinance of a local government unit.

All local government units were required to prepare and implement their comprehensive land use plans pursuant to the Local Government Code back in 1993.<sup>62</sup> Assuming therefore that such plans were already approved by the HLURB, local governments therefore have the final say in the use and disposition of shore and foreshore lands.

Lastly, a significant requirement is for Environmental Impact Statements to be prepared for activities and projects that will affect the quality of the environment, at least as it pertains to the coastal areas.<sup>63</sup> The use of the shore lands and foreshore for purposes other than protection, preservation, or conservation are always likely to affect the quality of the coastal environment in the locality.

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<sup>55</sup> Sec. 447(a)(1)(vi) and 458(a)(1)(vi), Id.

<sup>56</sup> Sec. 447(a)(2)(vi) and 458(a)(2)(vi), Id.

<sup>57</sup> Sec. 447(a)(3)(ii) and 458(a)(3)(ii), Id.

<sup>58</sup> Exec. Order No. 648 (1981), Reorganizing the Ministry of Human Settlements.

<sup>59</sup> Sec. 5(a), Exec. Order No. 648(1981)

<sup>60</sup> Sec. 5(b), Id.

<sup>61</sup> Ibid.

<sup>62</sup> Exec. Order No. 72 (1993), Providing for the Preparation and Implementation of the Comprehensive Land Use Plans of the Local Government Units Pursuant to the Local Government Code of 1991 and Other Pertinent Laws.

<sup>63</sup> Sec. 12 and 13, The Fisheries Code of 1998, in relation to Pres. Decree No. 1586 (1978) entitled 'Establishing an Environmental Impact Statement System, Including Other Environmental Management Related Measures and For Other Purposes.'

### 3.2.2 Legislation on Land Reclamation

In 1957, Republic Act No. 1899 generally authorized municipalities and cities to undertake and carry out reclamation of their bordering foreshore areas and establish docking and harbor facilities, in consultation with the Department of Finance and the Department of Public Works and Highways.<sup>64</sup> However, the power to reclaim lands generally delegated to municipalities and cities was revoked in 1973 by Pres. Decree No. 3-A.<sup>65</sup> Section 1 of the decree provided that:

"The provisions of any law to the contrary notwithstanding, the reclamation of areas under water, whether foreshore or inland, shall be limited to the National Government or any person authorized by it under a proper contract.

"All reclamations made in violation of this provision shall be forfeited to the State without need of judicial action.

"Contracts for reclamation still legally existing or whose validity has been accepted by the National Government shall be taken over by the National Government on the basis of *quantum meruit*, for proper prosecution of the project involved by administration."

The power to reclaim lands is currently vested in the Public Estates Authority (PEA) created in 1977.<sup>66</sup> But a number of other government agencies and corporations have from time to time been authorized to undertake reclamation work under special laws or issuances.<sup>67</sup> However, the PEA and these other government agencies do not have extensive regulatory functions over reclamation activities, as they are usually government-owned and controlled corporations undertaking proprietary functions on behalf of the national government.

### 3.3 Administrative Issuances

#### 3.3.1 The Standard Foreshore Lease Contract

The issuance of FLCs pursuant to the provisions of Commonwealth Act No. 141 is governed by administrative issuances implemented by the Department of Environment and Natural Resources (DENR). The controlling issuance at present is DENR Administrative Order No. 34-99, entitled "Rules and Regulations Governing the Administration, Management, and Development of Foreshore Areas, Marshy Lands, and Other Lands Bordering Bodies of Water," issued in August 10, 1999. The Order, however, does not clearly state the full content, particularly the terms and conditions, of the FLC issued pursuant to its terms. In order to determine such terms and conditions, it is necessary to

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<sup>64</sup> Sec. 1, Rep. Act No. 1899 (1958)

<sup>65</sup> Pres. Decree No. 3-A (1973), Amending Section 7 of Presidential Decree No. 3, dated September 26, 1972, by Providing for the Exclusive Prosecution by Administration or by Contract of Reclamation Projects. See Republic vs Court of Appeals, G.R. No. 103882 and 105276, November 25, 1998.

<sup>66</sup> See Pres. Decree No. 1084 (1977), Creating the Public Estates Authority, Defining its Powers and Functions, Providing Funds Therefor and For Other Purposes; also Exec. Order No. 525 (1979), Designating the Public Estates Authority as the Agency Primarily Responsible for All Reclamation Projects.

<sup>67</sup> For example, Rep. Act No. 7227 (1992) allowed the Bases Conversion Development Authority to do so in former military bases under its management, while Exec. Order No. 405 (1997) authorized the Philippine Ports Authority to undertake reclamation works in the port areas under its jurisdiction.

compare the standard form of the contract currently being used<sup>68</sup> with the existing law and previous issuances that do not appear to be inconsistent with the present Administrative Order.

The First Paragraph of the terms and conditions of the Lease Contract<sup>69</sup> simply expresses the fact that the contract is a lease contract pertaining to land of the public domain. The Second Paragraph<sup>70</sup> states that the term of the contract is for 25 years, renewable for another 25 years at the option of the Government, and provides a blank for the amount of the rental which is payable to the DENR-CENRO at a determined time. The Third Paragraph merely states the appraised value of the land and its improvements for the first 10 years; it likewise provides that a new appraisal shall be made every 10 years. These are fully in accord with the first 3 enumerations of mandatory conditions under Section 67 of the Public Land Act. The procedure for appraisal is prescribed in DENR Administrative Order No. 20-98.<sup>71</sup>

The Fourth Paragraph requires the applicant to construct "permanent improvements" appropriate for the purpose of the lease, which is left blank, subject to the approval of the Secretary of Public Works and Highways, which must be completed within the required time period under the law. The Fifth Paragraph specifies that the land covered by the lease shall be used only for the purpose stated in the preceding paragraph; otherwise, the contract may be rescinded and all improvements on the land may be forfeited in favor of the Government. The Sixth Paragraph provides for payment of the rentals and the taxes on the land and improvements thereon.<sup>72</sup>

The Seventh Paragraph prohibits the sub-leasing, assignment, or encumbrance of the land covered by the contract without the written permission of the Secretary of Environment and Natural Resources. The Eight and Ninth Paragraphs simply provide for a waiver on the part of the lessee to notices of demand for payment of the rental and all grace periods, and reduction of the rent on account of any loss or damage due to fortuitous events.<sup>73</sup>

The Tenth Paragraph allows the Government to rescind the contract and take possession of the land upon 30 days notice, for breach of any of the provisions of the contract. In case the improvements on the property are being let or hired out, duly authorized, to public use, the rentals and fees to be charged to the public are subject to regulation by the Department of Finance under the Eleventh Paragraph.<sup>74</sup>

The Twelfth Paragraph expressly states that the lease is subject to the easements of coast police and all other easements provided for by law, whether already in force or to be enacted in the future. It is also subject to the easements and other rights in favor of the

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<sup>68</sup> As contained in the DENR's internal Manual for Land Disposition, pp. 141 to 147.

<sup>69</sup> Page 141, DENR Manual for Land Disposition

<sup>70</sup> Ibid.

<sup>71</sup> DENR Administrative Order No. 20-98, dated May 20, 1998, on "Revised Rules and Regulation on the Conduct of Appraisal of Public Lands and Other Patrimonial Properties of the Government."

<sup>72</sup> Id., at p. 142

<sup>73</sup> Id., at pp. 142 - 143

<sup>74</sup> Id., at p. 143

owners of adjacent lands and those lands bordering on the foreshore and marshy lands.<sup>75</sup> This is likewise in accord with Section 67 of the Public Land Act.

The Thirteenth Paragraph allows the Government to cancel the lease contract at any time that the land subject thereof is deemed necessary for the public interest, protection of any source of water, or for any work of public benefit. The lessee is entitled to payment of the value of the improvements, but if only a portion of the land is required, the lease may be merely amended and the needed part excluded for the terms thereof.<sup>76</sup>

Paragraph Thirteenth-A expressly obliges the lessee to guarantee and provide the general public free access to and full use and enjoyment of the beach and nearby coastal waters, whether for livelihood or recreational purposes. A road right-of-way of not less than 3 meters in width must be provided by the lessee free of charge. Failure of the lessee to provide this right of way is a ground for termination of the lease.<sup>77</sup> This additional express condition was emphasized and added in Lands General Circular No. 51.<sup>78</sup>

Paragraph Thirteenth B allows the President of the country to review, amend, modify, revise, rescind, or revoke the contract whenever national interest requires it. Paragraph Thirteenth C permits the President to summarily suspend and order the cessation of all activities under the lease contract for breach of any of the contract's terms and conditions or any of the rules and regulations of the DENR.<sup>79</sup>

Paragraph Thirteenth D requires that the land be devoted only for the purpose stated in the lease, and that any change in the use of the property should be subject to the approval of the Human Settlements Regulatory Commission, which is now the Housing and Land Use Regulatory Board.<sup>80</sup>

Paragraph Thirteenth E provides that in case the improvements on the land are sub-leased, the Government shall be entitled to 50% of the sublease rental in excess of 10% of the assessed value of the improvements. According to Lands Office Circular No. 70-4, only the improvements are subject to sub-lease, and any document purporting to sub-lease the land is treated as a transfer of the leasehold rights rather than a sublease of the land.<sup>81</sup>

All the successors-in-interest of the original lessee are bound by the terms and conditions of the lease contract, according to the Fourteenth Paragraph. The lease application is also made a part of the contract by the Fifteen Paragraph, such that any misrepresentation or omission in the application is also a ground for rescission. The precise date of expiration of the contract is stated in the Sixteenth Paragraph, and it is said that there is presumption

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<sup>75</sup> *Id.*, at p. 143

<sup>76</sup> *Id.*, at pp. 143 - 144

<sup>77</sup> *Id.*, at p. 144

<sup>78</sup> Lands General Circular No. 51, dated November 21, 1978, on "Additional Condition in Lease Contracts Involving Foreshore Areas."

<sup>79</sup> *Id.*, at p. 145

<sup>80</sup> *Ibid.*

<sup>81</sup> Lands Office Circular No. 70-4, dated June 30, 1986, on "Implementing Lands Administrative Order No. 47 dated 13 December 1984 governing the share of government in the sub-leasing of improvements of lands covered by leases."

that the same will be renewed. Upon the termination of the lease, the Seventeenth Paragraph provides that all improvements on the land shall be vested in the State, unless the ground for termination is that provided for by the Thirteenth Paragraph explained above.<sup>82</sup> The Eighteenth Paragraph merely reiterates that the contract is still subject to the provisions of the Public Land Act.<sup>83</sup>

Generally speaking, all the foregoing provisions are consistent with the terms and conditions stated under the Public Land Act. However, it should be noted that the form Lease Contract is a generic contract intended to be applicable not only to foreshore lands, but also lands reclaimed by the Government by dredging, filling, or other means, marshy lands or lands covered with water bordering on the shores or banks of navigable lakes or rivers, and all other public lands.<sup>84</sup> It is therefore not specifically designed for foreshore leases in particular.

### 3.3.2 Related Lands Circulars

The expiration of the Lease Contract is presently governed by Lands Office Circular No. 70,<sup>85</sup> as reiterated in a Memorandum from the Secretary dated June 8, 1999 addressed to all Regional Executive Directors of the DENR. It provides for the procedure for monitoring and tracking the lease contracts, and reiterates that the lands occupied under the Lease Contract can never be the subject of acquisition by free patent or homestead, and that upon expiration of the contract the government shall temporarily take possession and administer the lands and improvement thereon. All buildings and improvements can be disposed of only by sale to a new applicant.

Lands General Circular No. 36 recognizes the preferential right of the riparian or littoral owners to the disposition of the foreshore areas adjacent to his property. The recognition of this preferential right dates back to the 1930s under the first Public Land Act. It is based on Article 4 of the Spanish Law of Waters which provided that the littoral owners are entitled to ownership of lands added to their property by the process of accretion and alluvial deposits formed by the action of the sea, if they are not necessary for purposes of public utility or establishment of industries, or for coast guard services.<sup>86</sup> However, an express declaration that the land so formed is not needed for public purposes is necessary.<sup>87</sup>

Lands General Circular No. 81 refers to the special case of tourist zones and marine reserves, and the processing of applications for disposition of lands within such zones. It is provided that even if a parcel of land is within a declared tourist zone, such a declaration

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<sup>82</sup> *Id.*, at p. 144

<sup>83</sup> *Id.*, at 145

<sup>84</sup> Sec. 59, Public Land Act

<sup>85</sup> Lands Office Circular No. 70, dated January 8, 1979, on "Rules and Regulations governing the Management of Government Lands covered by subsisting leases and the Management and Disposition of Lands covered by expired leases and of existing improvements thereon."

<sup>86</sup> Lands General Circular No. 36, dated February 7, 1978, on "Supreme Court Doctrines on Foreshore Lease Applications as Enunciated in *Santulan vs. Executive Secretary* (G.R. No. L-28021), December 23, 1977.

<sup>87</sup> *De Buyser vs. Director of Lands*, G.R. No. L-22763, March 1, 1983; *Navarro vs. Intermediate Appellate Court*, G.R. No. 68166, February 12, 1997.

does not operate to change the classification of the land or withdraw it from the reservation from disposition under the Public Land Act. But prior to acting on any application for disposition, the clearance and recommendation of the Philippine Tourism Authority should be obtained.<sup>88</sup>

#### 4.0 COMPARISON WITH OTHER COUNTRIES

Other countries in the world have already realized the importance of the foreshore and shore land areas and have created specific management regimes for them. In some it is a specific component of an overall coastal zone management policy, but others have more elaborate policy documents designed specifically and exclusively for the foreshore or part thereof (usually the beach). Examples of these are the Republic of Sri Lanka, the State of Sabah, Malaysia, the Republic of Jamaica, and County of Maui, Hawaii, USA.

##### 4.1 Sri Lanka

The Coastal Zone Management Plan 1997 includes the use of setback requirements in the foreshore area to protect life and property from coastal erosion and storm surges, minimize public investment in coastal protection works, protect and enhance the scenic value of coastal environments, provide buffer zones around identified coastal sites with special characteristics, minimize resource-use conflicts, ensure public access, and maintain consistency between local, regional, and national plans. The setback requirements are implemented through a Restricted Area where certain development activities are prohibited or significantly restricted. The Restricted Area is comprised of a zone extending from a Seaward Reference Line usually located at the 0.6 meter line from the mean sea level, and the Landward Reference Line which is determined by the Coast Conservation Department based on factors like the coastal erosion rate, exposure to extreme natural events, geomorphological characteristics, vulnerability of coastal habitats, significance of other natural components, level of development, cultural and natural sites, level of user conflict, legal status, and special area management sites.<sup>89</sup>

Within the Restricted Area is a Reservation Area where generally all activities are prohibited and no building of any structure is allowed. This extends from the Seaward Reference Line to a point determined by the Coast Conservation Department. The Coast Conservation Department, however, retains the discretion to issue permits for activities that can be demonstrated to not have significant adverse impacts on the coast nor obstruct access to and along the beach.<sup>90</sup> Outside the Reservation Area and extending to the Landward Reference Line is a "soft-zone" where certain low-impact activities are permitted.<sup>91</sup> In all cases, the Coast Conservation Department has the authority to grant exemptions and permit variances from the setback guidelines where the public interest requires it.<sup>92</sup>

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<sup>88</sup> Lands General Circular No. 81, dated June 4, 1981, on "Rules and regulations governing the acceptance, processing and disposition of public land applications inside tourist zones and marine reserves."

<sup>89</sup> Coast Conservation Department, Coastal Zone Management Plan Sri Lanka, 1997. pp. 82-83

<sup>90</sup> Id., p. 84

<sup>91</sup> Id., pp. 85-85

<sup>92</sup> Id., P. 85

## 4.2 Sabah, Malaysia

The Water Resources Enactment 1998 classifies the foreshore as State land, and any development thereon is subject to the approval of the government. A foreshore reserve area of at least 20 meters landward from the mean high water mark is imposed, but this may be increased by the Water Resources Manager, the official charged with implementation of the Enactment. This extension of the reserve area is warranted in areas with high morphological activity. The state government's Land Surveys Department is responsible for delineating the foreshore reserve, while a Town and Regional Planning Department is responsible for delineating setback limits. This setback limit may vary depending on the local meteorological or oceanic conditions and hinterland use; for example it is set at 60 meters for open coastal areas and beaches, but 30 meters for more sheltered areas. No permanent structures are allowed within the zone. "Permanent structures" are defined as those which cannot be economically relocated if they are subject to damage by coastal response and flooding during stormy weather, and include buildings, swimming pools, and roads. Non-permanent structures are allowed, which include buried or above-ground utilities, landscaping, small structures like pagodas, wooden structures, erosion backstops that prevent erosion damage to small structures. The classification of a structure as permanent or non-permanent usually depends on the expected downstream effects of possible collapse of the structure.<sup>93</sup>

## 4.3 Jamaica

The use of foreshore areas is regulated by the Beach Control Act of 1956 and the Prescription Act. Under Jamaican common law, no person has any right of access over the foreshore, except that which is necessary for fishing or navigation, or if a right of way through the area is recognized; nor is there any right to stay or for recreation. But the Beach Control Act of 1956 vests all rights over the beaches in the State, while the Prescription Act excepts from the application of the Beach Control Act all lands titled prior to 1956 or acquired by fishermen through prescription (the prescriptive period is 20 years). The State recognizes a right of access through the beaches in favor of owners of the adjacent properties, but a public right of unrestricted access pertains only those beaches which are declared to be "public beaches." A Beach Control Authority controls the use of the foreshore areas through licensing; and its priorities include provision of beaches for fishermen and public recreation, preservation of scenic coastal drives, licensing of hotel and resort uses and other commercial activities on the foreshore, maintenance of clean and healthy beaches, and expansion of public access.<sup>94</sup>

At present, the Beach Control Policy of Jamaica is undergoing review and revision, due to public clamor over the diminishing opportunities for enjoying the beaches and the general state of disrepair of most public beaches; many fishermen are also being displaced by coastal commercial development, particularly mariculture. The new policy being developed intends to enhance the rights of Jamaicans to use and enjoy their natural heritage, expand

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<sup>93</sup> See [www.iczm.sabah.gov.my/Reports/shoreline%20Management/mst.FORESHORE.htm](http://www.iczm.sabah.gov.my/Reports/shoreline%20Management/mst.FORESHORE.htm)

<sup>94</sup> See [www.nrca.org/CZM/Beach%20policy/contents.htm](http://www.nrca.org/CZM/Beach%20policy/contents.htm)

beach-related recreation opportunities for residents and tourists, protect traditional rights of access to and from the sea, and regulate nearshore mariculture activities.<sup>95</sup>

#### 4.4 Maui

Hawaii's Coastal Erosion Management Plan provides the framework for cooperation between county, state, and federal governments as well as community and environmental groups. Included thereunder is a Beach Management Plan for Maui, which focuses on shoreline issues for the Island of Maui which is well-known for its beach resources. Maui's coastline faces a massive problem of coastal erosion from natural processes of sea level rise, wave and current action, and sediment deficiencies aggravated by human activities like sand mining, dune grading, sand impoundment, harbor and navigational works. The Beach Management Plan of Maui identifies 13 major areas of concern for beach management, with corresponding recommendations. Among these is the use of shoreline setbacks to guard against the impacts of coastal erosion. The shoreline setbacks are intended to act as buffer zones against coastal hazards and protect beach front property from high-wave events and coastal erosion. Originally, a 40-foot setback zone was applied in Maui, but this has been found to be quite inadequate. Setbacks are now to be determined on a site-specific basis down to the scale of the individual property, based on historical rates of coastal erosion. Scientific studies of coastal erosion hazards will be used to project coastal erosion rates over the next 30, 60, and 90 years, and made the basis of identifying appropriate setbacks. These setbacks would be incorporated into the Shoreline Setback Rules adopted by the Maui Planning Commission, along with construction and land-use performance standards.<sup>96</sup>

### 5.0 ANALYSIS OF ISSUES

#### 5.1 In General

##### 5.1.1 Legal and Constitutional Restraints on Leasing

The threshold issue that needs to be addressed in the light of existing legislation and policy is whether or not FLCs are still permitted by law. Apparently, this is no longer permissible not only on legal, but also on Constitutional, grounds.

In considering legislation and policy on natural resources, it must always be kept in mind that the fundamental framework for utilization and disposition of natural resources must be considered as the starting point for any inquiry. Lands of the public domain, which include the foreshore, are particularly important subjects of Constitutional strictures. Natural resources law needs to be viewed within the context of the prevailing Constitutional framework in order that the core ideas of the State on the utilization and disposition of its patrimony may be properly expressed and manifested.

The Public Land Act was enacted in 1936, under the 1935 Constitution. Therein, Article XIII on the Conservation and Utilization of Natural Resources provided:

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<sup>95</sup> Ibid.

<sup>96</sup> See [www.soest.hawaii.edu/SEAGRANT/bmp.htm](http://www.soest.hawaii.edu/SEAGRANT/bmp.htm)

"SECTION 1. All agricultural, timber, and mineral lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy and other natural resources of the Philippines belong to the State, and their disposition, exploitation, development, or utilization shall be limited to citizens of the Philippines or to corporations or associations at least sixty per centum of the capital of which is owned by such citizens, subject to any existing right, grant, lease, or concession at the time of the inauguration of the Government established under this Constitution. Natural resources, with the exception of public agricultural land, shall not be alienated, and no license, concession, or lease for the exploitation, development, or utilization of any of the natural resources shall be granted for a period exceeding twenty-five years, renewable for another twenty-five years, except as to water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, in which cases beneficial use may be the measure and limit of the grant." (underlining ours)

Under the above-quoted provisions, it was clear that the State is authorized to lease lands of the public domain to private citizens and corporations. The modes of utilization of natural resources were generally through grants, licenses, concessions, and leases. Likewise, the 144-hectare area-limit for lease of foreshore lands prescribed by The Public Land Act is based ultimately on this provision of the 1935 Constitution. These provisions were adopted substantially in the 1973 Constitution, which provided in Article XIV, on the National Economy and Patrimony of the Nation:

"SECTION 8. All lands of public domain, waters, minerals, coal, petroleum and other mineral oils, all forces of potential energy, fisheries, wildlife, and other natural resources of the Philippines belong to the State. With the exception of agricultural, industrial or commercial, residential, or resettlement lands of the public domain, natural resources shall not be alienated, and no license, concession, or lease for the exploration, or utilization of any of the natural resources shall be granted for a period exceeding twenty-five years, except as to water rights for irrigation, water supply, fisheries, or industrial uses other than development of water power, in which cases, beneficial use may be the measure and the limit of the grant.

"SECTION 9. The disposition, exploration, development, exploitation, or utilization of any of the natural resources of the Philippines shall be limited to citizens of the Philippines, or to corporations or associations at least sixty per centum of the capital which is owned by such citizens. The Batasang Pambansa, in the national interest, may allow such citizens, corporations or associations to enter into service contracts for financial, technical, management, or other forms of assistance with any foreign person or entity for the exploration, or utilization of any of the natural resources. Existing valid and binding service contracts for financial, technical, management, or other forms of assistance are hereby recognized as such." (underlining ours)

It may be noted that under the 1973 Constitution, a new mode of utilization of natural resources was added to grants, licenses, concessions, and leases, that of service contracts for financial, technical, management or other forms of assistance.

However, the 1987 Constitution now provides differently, for in Art. 2 of Article XII on the National Economy and Patrimony:

"SECTION 2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.

"The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens.

"The Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens, as well as cooperative fish farming, with priority to subsistence fishermen and fishworkers in rivers, lakes, bays, and lagoons.

"The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources.

"The President shall notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution.

"SECTION 3. Lands of the public domain are classified into agricultural, forest or timber, mineral lands, and national parks. Agricultural lands of the public domain may be further classified by law according to the uses, which they may be devoted. Alienable lands of the public domain shall be limited to agricultural lands. Private corporations or associations may not hold such alienable lands of the public domain except by lease, for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and not to exceed one thousand hectares in area. Citizens of the Philippines may lease not more than five hundred hectares, or acquire not more than twelve hectares thereof by purchase, homestead, or grant.

"Taking into account the requirements of conservation, ecology, and development, and subject to the requirements of agrarian reform, the Congress shall determine, by law, the size of lands of the public domain which may be acquired, developed, held, or leased and the conditions therefor." (underlining ours)

The State, therefore, has only three options in utilization of the natural resources: direct exploitation by the State itself; agreements for co-production, joint-venture, or production-sharing; and under technical or financial assistance agreements. Leases are not included in these modes of utilization.

In the case of *Miners Association of the Philippines vs. Factoran*,<sup>97</sup> a case involving a lease of mining claims, the Supreme Court declared that disposition of mining resources by means of a lease is no longer permitted by the above provisions of the 1987 Constitution. In fact, all laws relating to "license, concession, or lease" of mineral resources which were permitted under the 1935 and 1973 Constitutions were deemed to have been repealed and no longer considered as governing law with the effectivity of the 1987 Constitution. By the same reasoning, leases of foreshore lands which are among the natural resources of the country should be deemed to have been proscribed beginning in the 1987 due to Section 2 of Article XII.

Additionally, Section 3 of Article XII specifically states that the kind of alienable lands that may be subject of lease (the only mode of holding public lands) are limited only to agricultural lands. Foreshore lands cannot be included within the common legal definition of "agricultural lands." Despite the old ruling that agricultural lands legally mean those public lands which are not timber or mineral lands,<sup>98</sup> the jurisprudence states that the test is not whether it is actually agricultural or used for agriculture, but whether it is susceptible to cultivation for agricultural purposes.<sup>99</sup> Further, the term "agricultural lands" as used in the Section 3, Article XII of 1987 Constitution is limited to only those lands which are arable and suitable for agriculture and do not include other classes of land such as commercial, industrial, and residential lands.<sup>100</sup> It is clear that foreshore lands, which are covered and uncovered by the tides, are certainly not susceptible to cultivation for agricultural purposes.

Accordingly, the prohibition is consistent with Section 45 of the Fisheries Code which states the mandatory rule that public lands such as tidal swamps, mangroves, marshes, foreshore lands, and ponds suitable for fishery operations shall not be disposed of or alienated. Since the mention of the term "public lands" is followed by an enumeration of types of areas on margins of the shore, we must interpret this particular rule under Section 45 to mean all shore areas of a similar character. Therefore, all shore areas that are submerged at regular intervals by seawater, including the foreshore, are not subject to alienation or even disposition by lease.<sup>101</sup>

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<sup>97</sup> Supreme Court G.R. No. 98332, January 16, 1995.

<sup>98</sup> *Mapa vs Insular Government*, 10 Phil 182

<sup>99</sup> *Krivenko vs Register of Deeds*, 79 Phil 461

<sup>100</sup> *Natalia Realty, Inc. vs. Department of Agrarian Reform*, G.R. No. 103302, August 12, 1993.

<sup>101</sup> However, note that the same section authorizes Fishpond Lease Agreements for public lands declared available for fishpond development. The question of course must be asked whether such Fishpond Lease Agreements are similarly prohibited by the Constitution. It appears that they are, and the provisions of the Fisheries Code on aquaculture allowing Fishpond License Agreements are therefore also starkly inconsistent with the Constitution.

The power of the Department of Agriculture to declare portions of the said public lands as reservations under the same section or mangrove cultivation areas under Section 81 are not inconsistent with the Constitutional proscription. These types of uses do not need to involve disposition of the land, and they are undoubtedly for the public purpose of assisting in the conservation of the fishery resources.

Since the 1987 Constitution does not operate retroactively, existing Foreshore Lease Agreements that were approved prior to 1987 may be permitted to continue in force. This is, however, subject to the existing terms and conditions of the FLCs that permit the government much flexibility in amending or modifying the lease contract.

### **5.1.2 Alternatives to Leasing**

The deletion of leasing as a mechanism for utilization of the foreshore areas of the country need not necessarily result in the State's inability to make use of such areas. After all, the fundamental law also provides for several other modes of utilization and exploitation which, in the long run, will prove to be much more profitable for government. The 1987 Constitution permits either direct use or the use of co-production, joint venture, and producing-sharing agreements.

Joint venture agreements hold particular promise for dealing with foreshore utilization. Though the terms and conditions of joint venture agreements will of course vary, generally it provides the State much better opportunity to control shoreline development and to derive a higher income stream. Joint ventures entail the government to invest in the subject matter of the lease as active partners in shoreline activities, and in fact permit government to continue having an interest in the activities taking place on the foreshore and shore lands long after the execution of the contract.

## **5.2 Regarding the Specific Issues and Problems**

In light of the probable unconstitutionality and illegality of FLCs as a mode of disposition of foreshore lands, the subsequent discussion should be read only with existing FLCs (those executed and approved prior to 1987) in mind. They may also apply to areas under pending applications for FLC, where the applicants have already entered into the premises pursuant to temporary permits granted under Section 68 of the Public Land Act.<sup>102</sup>

### **5.2.1 Classification**

Where the shore does not have a foreshore area, such as those areas where that land ends in with cliff, there should be no question as to the status of the lands proceeding from the shoreline. The cliff face is classified as forest land under Section 15 of the Forestry Code, on account of the fact that a cliff has more than 18% slope. As forest land, it is land of the public domain. At the same time, from the edge of the water at the lowest point of

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<sup>102</sup> Incidentally, temporary use under Section 68 of the Public Land Act may not be constitutionally prohibited since it does not necessarily involve a lease agreement, and where only private citizens are concerned might be considered as "small-scale utilization" permissible under the third paragraph of Section 2, Article XII of the 1987 Constitution

the cliff, and proceeding horizontally for the distance prescribed by the Water Code (3 meters in case of urban areas, 20 meters in agricultural areas, and 40 meters in case of forest areas), the land is subject to the easements of public use for purposes of recreation, navigation, floatage, fishing, and salvage, and to the mandatory prohibition against the building of any structure of any kind.<sup>103</sup> What determines whether the area is urban, agricultural, or forest is the use of the land on the top of the cliff, and its classification under the municipality or city's land use plan and zoning ordinance. All structures on cliff faces within the said zone are illegal structures and should be caused to be removed for being in violation of the setback requirements of the law.

If a coastal road or highway has been built on the shore edge, the existence of the highway does not affect the easements of public use and the prohibition against all structures within the prescribed zone. The overlap between the setback zone and the 10-meter easement generated by the road likewise should have no effect on the setback zone, since the easement generated by the road also prohibits the construction of structures within that area.<sup>104</sup> If the coastal road or highway is located at the landward edge of the setback zone, then the coastal area where no construction is permitted is effectively extended landward. If the same is located inside the setback zone, then the easements of public use and prohibition against structures should similarly not be affected; however, as a matter of policy, government should in the future respect its own limitations and not build even roads or highways and their accompanying fence structures within the setback zone.

Mangroves are necessarily classified as forest areas, and this classification effectively overrides the character of the area as foreshore land. Where mangrove stands are located on the foreshore, such areas are subject to the rules on mangroves, not foreshore areas. However, the shape of configuration of the mangrove zone should not be based on the actual location of the edge of the mangrove tree, but rather by the requirements of the mangrove stand for appropriate areas for growth and sustenance. Small and irregular gaps in the mangrove stands should not be considered as empty foreshore areas for the purpose of simplifying the management of the bordering mangrove stands.

Problems in the classification of the lands on the shore can be resolved relatively easily if the municipality or city enacts the appropriate comprehensive land use plan and zoning ordinances pursuant to such plan. It may validly include in such land use plan and zoning ordinances special restrictions or prohibitions regarding any structures within the setback zone or the foreshore. The foreshore is deemed part of the land territory of the municipality, despite its being submerged at high tide, by virtue of the fact that municipal

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<sup>103</sup> Art. 51, The Water Code.

<sup>104</sup> Exec. Order No. 254 (1987), entitled "Amending Executive Order Numbered One Hundred and Thirteen, Series of Nineteen Hundred Fifty Five". Section 1 provides:

"SECTION 1. The last sentence of No. 1, General Provisions, Executive Order No. 113, Series of 1955, as amended, is hereby further amended to read as follows:

"National roads shall have a right-of-way of not less than twenty (20) meters, provided that a right-of-way of at least sixty (60) meters shall be reserved for roads constructed through unpatented public land and at least one hundred twenty (120) meters reserved through naturally forested areas of aesthetic or scientific value."

waters are measured from the low water line.<sup>105</sup> To interpret this otherwise would be to create a gap in jurisdiction, which the law abhors in principle.

Existing comprehensive land use plans and zoning ordinances may be reviewed by the municipality or city to determine the appropriateness of including specific rules or restrictions for the setback zone and foreshore areas. The HLURB, as the regulatory authority, may issue supplemental guidelines for undertaking this type of zoning activity, and may also prescribe rules and restrictions for all structures that are currently located within the subject area, or which are in the process of being constructed.

### 5.2.2 Access

Structures built on the shore lands and foreshore, including all fences, revetments, jetties, causeways, and similar buildings cannot impede direct public access to and from or across the shore area. All such obstructions are illegal, for being in violation of both the law and the mandatory terms and conditions of the FLCs. Fences on the shore lands are additionally in violation of the easement for public use and prohibition against structures under the setback requirements of the Water Code.

The easements for access being for public benefit, any interest member of the public, or the local governments in representation of their respective affected constituencies, have the right to administrative recourse to the DENR. They may demand revocation or rescission of the FLC for patent violation of its terms and conditions. In the alternative, the local governments may also require the opening of all the obstructing structures to permit the exercise of the mandated right-of-way, pursuant to their ordinance-making powers. It is also possible to declare such obstructions to public access as nuisances that are subject to abatement by the local government acting through the municipal or city mayor.<sup>106</sup> This can be done through an appropriate ordinance pursuant to the Local Government Code.<sup>107</sup> However, all structures or properties must be treated similarly, i.e. the local government cannot discriminate against only one or some of the structures, but must require all of them which are similarly situated to be opened to public access.

### 5.2.3 Resource Use

Any instances of removal of sand and gravel from beaches and foreshore areas, contributing to erosion, are primarily the responsibility of the provincial governor who is the permitting authority. Therefore, local governments aggrieved by this instance should hold the provincial governor accountable since the permits emanate from that office.

There are two legal requirements that the local government can insist upon prior to the grant of any permits that may result in extraction of foreshore materials. The first is the

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<sup>105</sup> Sec. 4(r), The Fisheries Code of 1998.

<sup>106</sup> Nuisances are defined by Art. 694 of the Civil Code, and among others can include any acts, omissions, establishment, business, conditions of property, or anything else which obstructs or interferes with the free passage of any public highway or street or any body of water. The lack of an actual highway or street need not prevent the application of this provision considering that all foreshore lease contracts are subject to the easement of right of way for the public.

<sup>107</sup> Sec. 447(a)(4)(i) and Sec. 457(a)(4)(i)

requirement for consultation pursuant to Section 26 and 27 of the Local Government Code, and the second is for the filing of an Environmental Impact Statement under Sections 13 and 14 of the Fisheries Code of 1998. In both these instances, the local government is permitted to provide input and therefore be considered in the decision-making process of the prospective grantor of the permit.

With respect to ancillary structures, the local governments should clarify in their permits and licenses that such grants do not automatically grant other rights or permit other activities which are under the jurisdiction of other agencies of government. Thus, the right to construct fish cages and traps do not necessarily permit the construction of a guard structure on the foreshore. Licenses and permits, being grants of privileges, are not construed liberally, but rather strictly in accordance with the terms and conditions attached to the license or permit itself.

#### **5.2.4 Public Safety**

Structures standing on cliff-faces and subject to the dangers of coastal erosion are subject to reasonable limitations under the comprehensive land use plans and zoning ordinances, as well as any restrictions or rules that may be issued in implementation of the National Building Code<sup>108</sup>. Incidentally, the National Building Code requires that structures be permitted only at a safe distance from bodies of water.<sup>109</sup> The HLURB therefore has regulatory jurisdiction to require observance of the setback requirements in the implementation of the National Building Code by the municipal or city engineers.

Structures, which are in danger of collapsing due to their location on the foreshore or at the edge of cliff faces, represent public dangers which may likewise be declared as nuisances. If so, they may be demolished if necessary. Local governments, in exercise of the general welfare powers, as well as the power to regulate or restrict the use of property within their jurisdictions, may also impose conditions or restrictions on existing structures, if demolition is not an acceptable option.

Private seawalls, causeways, jetties, revetments, and other similar structures accelerate the erosion of the coastline and may be likewise declared as nuisances especially if the increased erosion causes public injury or dangers by undermining roads or other structures on the edge of the shore. Where they impede or obstruct public access, they are likewise subject to demolition in order to restore access.

#### **5.2.5 Riparian Rights**

The exercise of riparian rights is perhaps the most problematic, as private and individual decisions regarding the exercise of property rights is not subject to legislative controls. Thus, if a person wishes to lease property under his possession to another, there is little that can be done to prevent it. However, what can be done is to ensure that the same

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<sup>108</sup> Pres. Decree No. 1096 (1977), entitled "Adopting a National Building Code of the Philippines Thereby Revising Republic Act Numbered Sixty-Five Hundred Forty-One."

<sup>109</sup> Sec. 105, Pres. Decree No. 1096, supra.

rules and restrictions are applicable to both a riparian owner and any prospective successor-in-interest that he may have.

### 5.2.6 Shoreline Management

The construction of retaining walls, seawalls, jetties, causeways, revetments, and all types of coastal structures outside of the land territory of the municipality or city are beyond their licensing powers. It should be noted that within municipal waters, the law presently allows the exercise of municipal or city jurisdiction as they pertain to fisheries management. Thus, unless the structure is related to a fishery activity, the municipality or city has no power to license or permit any structures. The authority that should be made accountable for these structures in the foreshore and offshore would be either the DENR if it is within a FLC area, or the DPWH if it is outside thereof. Without DPWH approval, such structures in the foreshore are illegal, because shore protection measures and structures can only be undertaken by the DPWH.

It should be noted that the construction of permanent structures is still within the control of the DENR, if it so makes such control a condition in the FLC. The terms and conditions enumerated in Section 67 of the Public Land Act are only minimum terms and conditions after all, and the government, as the lessor, has every prerogative to impose additional terms and conditions depending on the situation.

### 5.2.7 Regulatory Processes

The confusion in the regulatory processes has been brought about the anachronistic and antiquated laws being applied without due and proper regard to the impact of subsequent legislation. It has also arisen because of the lack of appropriate information regarding the powers and functions that may be exercised by the appropriate government agencies under the current status of the law.

To harmonize the exercise of regulatory jurisdictions over the foreshore and shore lands, the corresponding roles, powers, and functions under the law of the concerned offices or agencies of government should be clarified as follows:

#### *a. Local Government Units*

LGU's have the primary responsibility under the law to regulate the use of the shore lands and foreshore, including the structures thereon, and to ensure observance of the applicable laws. This primary responsibility springs from its power to enact comprehensive land use plans and zoning ordinances regulating the use of lands within its territory, as well as the power to regulate the use of property (including land, buildings, structures, and public places) within its jurisdiction. It also emanates from its jurisdiction to regulate business establishments and business activities within its territory, as well as to authorize marine and seashore or offshore activities. These powers directly regulating human activities are reinforced by the jurisdiction of the LGUs to undertake ecologically protective measures, which are justifiable in the case of foreshore and shore lands that are subject to coastal erosion.

The land classification and use-planning powers of the LGUs are no small measure, for even the DENR's classification and management of public lands within the LGU's territorial jurisdiction must be in accord with the municipality or city's classification once it is approved by the HLURB. Such land classification must take into account the implementation of the setback zones provided for by The Water Code, and the zoning ordinance promulgated to implement the land use plan should clearly require observance of such setback zones by prohibiting construction of structures within them. The land use plan can extend to the foreshore lands adjacent to the shorelands, since the land use planning exercise covers all land territory of the municipality or city, that ends at the low water line in consonance with the definition of the municipal waters under the Fisheries Code.

LGUs may enact ordinances regulating the structures that are currently built on the shore lands or in the foreshore. This includes the power to ensure compliance with the terms and conditions of the FLCs regarding the public's right-of-way through the leased area, as well as the provision of The Water Code on the easements of public use and prohibition against structures. The LGU may validly declare obstructions to public access as public nuisances since such obstructions are in violation of the mandatory conditions of the law for the continued occupation of the premises by the lessee. Where nuisances are declared, they may be abated, and therefore the LGU may validly require the lessee to voluntarily remove the obstruction to the public's right-of-way or itself cause the removal of the obstruction if the lessee refuses.

Outside of the land use plans and zoning ordinances, LGUs may also enact ordinances to put in place shoreline management projects or programs that will allow it to consciously manage the shore land and foreshore areas as a distinct area of concern. This management plan may be a distinct component of a comprehensive coastal resource management plan, or a stand-alone program that is however coordinated with its land use plans and coastal resource management plans. LGUs may find it useful to study similar plans that have been undertaken in other countries.<sup>110</sup>

The LGUs may also seek administrative recourse with the DENR, requesting cancellation of the lease for clear violation of its terms and conditions. The DENR cannot refuse such request if the violation is clearly in evidence, since it is mandated by law to ensure compliance with the terms and conditions of the FLC it entered into. As the primary representative of the National Government, the DENR is accountable for ensuring compliance with its own contracts; to do otherwise would be a dereliction of duty and malfeasance on the part of the responsible DENR officer.

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<sup>110</sup> Some examples of shoreline management undertaken at local, not national levels, include the Beach Management Plan of Maui County, Hawaii, the full text of which is available online at [www.soest.hawaii.edu/SEAGRANT/bmp.htm](http://www.soest.hawaii.edu/SEAGRANT/bmp.htm); the foreshore reserve and setback requirements of Sabah, Malaysia under the Water Resources Enactment 1998, which can be found online at [www.iczm.sabah.gov.my/Reports/shoreline%20Management/mst.FORESHORE.htm](http://www.iczm.sabah.gov.my/Reports/shoreline%20Management/mst.FORESHORE.htm); and the Public Access Policies on the Foreshore of New York County that can be viewed online at [www.dos.state.ny.us/cstl/policies/policy20.html](http://www.dos.state.ny.us/cstl/policies/policy20.html). These documents online are very helpful in providing models and references for local foreshore and shore land management policy documents.

*b. The Housing and Land Use Regulatory Board*

The HLURB has the responsibility of prescribing standards for construction of structures on shore lands and foreshore areas covered by the comprehensive land use plans and zoning ordinances of the municipalities and cities. These standards are applicable to both private and public entities, and include minimum safe distances from bodies of water, which should not be less than the prescribed setback zones under The Water Code. Such minimum safe distances can be greater depending on the characteristics of the terrain along the shore. Other standards include prescribed construction standards for all structures that may be built on the shore lands or foreshore, whether they are residential, commercial, or other types of buildings. Such standards must also give effect to the public's right-of-way or access to/from and across the shore, with prescriptions for mandatory distances between structures or fences if necessary.

The HLURB may also assist the municipalities and cities in amending or revising their approved comprehensive land use plans and zoning ordinances if needed, in case the special situation of the shore lands and foreshore areas was not clearly set forth in the plans and ordinances previously submitted. To do so, the HLURB may issue appropriate guidelines for the establishment and/or clearing of the setback zones, building standards, and procedures for compliance.

One issue, which the HLURB may also address under its general power to prescribe land use and zoning standards, is the adequacy of the setback zones under The Water Code. The 3, 20, and 40 meter setback zones may not be adequate, considering that the dangers that must be protected against (coastal erosion, storm surges, beach loss, and the like which result from the natural interaction of the sea and land) differ in intensity depending on local conditions. The problem with the setback zones under The Water Code is that they are fixed, rather outdated, and do not take into account specific objectives that should be expressed in requiring the setbacks.

Setback zones in other places like Sabah, Malaysia and Maui, Hawaii are not of fixed widths, and may be extended as needed by the authorities. In Maui, the setback requirements are based on scientific studies anticipating the rate of coastal erosion projected over several decades. In Sabah, it is determined on a case-to-case basis, depending on local meteorological and ocean conditions and land use. And in Sri Lanka, the 1997 Coastal Management Plan provides for a setback zone of varying widths upon determination of the Coast Conservation Department. The setback zone is further divided into two sub-zones called a reservation area in which strictly no building is allowed (except for absolutely essential structures like coastal navigation aids), and a restricted area in which low-impact activities are permitted. The width depends on the vulnerability of the area to coastal erosion, which in turn is based on factors such as density of development, availability of free space, exposure to extreme natural events.<sup>111</sup>

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<sup>111</sup> Beach Management Plan of Maui, and foreshore and setback requirements under the Water Resource Enactment 1998 of Sabah, *supra*. See also the Revised Coastal Zone Management Plan of Sri Lanka, 1997. Coast Conservation Department, 1997, at pp. 82-85.

In the same vein, the HLURB should also undertake a study on appropriate setback zone requirements and procedures for including them into municipal or city zoning ordinances. It should consider the setback requirement under The Water Code as minimum protective zones; and prescribe guidelines which allow LGUs to determine their own safety zones in addition to the setback zone required by law. The HLURB is a key agency since it already has the mandate to regulate structures in relation to land use; while the LGUs already have the means for implementation and enforcement in accordance with their powers and functions under the law. While the DENR does have management powers over public lands, it does not have the same influence with respect to private property; in fact, the FLC does not even have any provisions regulating the types of structures that are constructed by a foreshore lessee. Furthermore, the DENR is bound to respect the land classification and zoning ordinances of the LGUs.<sup>112</sup>

*c. The Department of Environment and Natural Resources*

The DENR as the signatory of the FLCs has the duty to ensure that the terms and conditions contained in the contract are complied with. Thus, complaints by LGUs or the public regarding breaches of the contract should be entertained and acted upon immediately. The DENR as lessor has the option of either requiring the lessee to comply with the conditions, or rescinding the contract. Complaints may be initially coursed through the CENROs who are primarily responsible for the processing of the contracts, and are also responsible for monitoring compliance by the lessee.

The Secretary of Environment and Natural Resources, acting as the direct representative of the President of the Philippines, may also modify and amend the existing FLCs in such a manner as to ensure faithful compliance with the terms and conditions thereof, or to include additional clauses to protect the public's rights and address their concerns. The modification and amendment of the contract at any time during its duration is specifically provided for in the contract, and therefore there is no need to await the expiration thereof.

Of interest is the provision under the existing contract permitting the erection of permanent improvements on the foreshore. Since this is based on the mandatory provisions under The Public Land Act promulgated in 1936, the current contracts must be modified to take account of the fact that the basic framework of the law has changed since that time. The fact that The Water Code prohibits the construction of permanent structures within the setback zone implies that the structures on the adjacent foreshore should likewise similarly be prohibited or at least discouraged, otherwise, the setback zone would be rendered useless.

The DENR, as lessor, has the right and authority to determine what are the appropriate types of structures that can be permitted within the foreshore area, and the existing FLCs should be amended or modified to reflect more precisely what these types of structures are. At minimum, they cannot be any type of structure that can be made the basis of appropriation or claim to title at any future point in time. Likewise, they cannot be of the type that will deprive the public of similar rights to the same foreshore area; this is in

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<sup>112</sup> Sec. 5(b), Exec. Order No. 648 (1981), entitled "Reorganizing the Ministry of Human Settlements," as amended.

consonance with the principle that no one person has any greater rights than others to the use of the public domain. Thus, enclosures and residential or commercial structures cannot be built on the foreshore; neither can revetments, jetties, or fence-like seawalls be permitted.

While the foreshore may be subject of existing lease contracts, such lease contracts do not allow appropriation of the area to the exclusive benefit and use of only the lessee or any persons authorized by him or her. The fact that only a lease is the permitted mode of disposition under the previous laws indicates that the public retains its rights to use the foreshore areas in accordance with easements and access rights reserved by law, and which the State as the principal lessor is required to enforce. The foreshore is still a part of the public domain and subject to the public's right to use the same for lawful purposes. Littoral rights are determined entirely by statute, and unless such statutes are amended by congressional action, they are controlling.<sup>113</sup>

Any part of the foreshore which has been illegally and exclusively appropriated by private citizens or corporations, as in the case of private reclamations, are subject to ejectment by suits filed by the DENR. This is in accordance with the doctrine that lands of the public domain are not subject to appropriation and are outside the sphere of commerce; they are intended for public uses (unless the contrary is expressly declared) and for the benefit of those who live nearby.<sup>114</sup> Any illegal occupation is a mere detainer, subject to suit. An interested party, particularly the LGU or the inhabitants of the nearby areas, has the right to ask the DENR to file the appropriate suit for illegal detainer.

The Environmental Impact Statement (EIS) System may be applied to foreshore and shore land activities subjects of lease contracts. This is based on the provision of Section 12 and 13 of the Fisheries Code of 1998. Thus, the DENR should issue the appropriate guidelines for preparation and submission of EIS by the current lessees, with the end in view of using such EIS as a means of monitoring compliance by the lessee with environmental standards and safeguards.

Regardless of the lack of provision for LGU coordination and consultation under the existing issuances and procedures governing FLCs, the DENR is required by the Local Government Code to consult with and inform the LGUs regarding any program or project that can affect the ecological balance or which will be implemented within the jurisdiction of the LGU. The grant of any type of permit over foreshore and shore land areas, whether temporary or in the form of an FLC or in connection therewith, is subject to the requirement for consultation with the LGU. Furthermore, the DENR is required to respect the land use plan and zoning ordinances of the LGUs, and cannot act inconsistently with such plans; this makes LGU consultation all the more necessary.

Finally, it must be recognized that FLCs have been of doubtful constitutionality since 1987, and further they are *ultra vires* on account of the prohibition under Section 45 of the Fisheries Code of 1998. Only FLCs approved before 1987 may be permitted to continue until expiration of their periods; afterwards, no new applications for FLCs over the same

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<sup>113</sup> Kock Wing vs. Philippine National Railway, G.R. No. 31662, February 14, 1930.

<sup>114</sup> Ignacio vs. Director of Lands, G.R. No. L-12958, May 30, 1960.

areas can be entertained. All applications for FLCs filed after 1987 must be denied, and any FLCs issued after 1987 must be rescinded or revoked for being null and void. Considering however, that there is a presumption of constitutionality until otherwise determined by a court of law, the rescission or revocation of such FLCs should be carried out in a manner that gives due consideration to the lessee's rights.

Considering that the shore lands (particularly those parts which are of the public domain at present) and foreshore areas are subject to a number of development pressures and activities, it would do the DENR well to undertake a specific study of shoreline management, similar to that undertaken in other countries<sup>115</sup>, to provide it with an overall program and long-term strategic guidance in management of the country's coastline.

*d. The Department of Public Works and Highways*

The DPWH is responsible for the issuance of permits to construct improvements on lands of the public domain. As such it is primarily responsible for any person or entity commencing any construction on the shore lands and foreshore. The DPWH should consider the location and type of the structure as primary criteria in deciding whether or not to grant the permit.

If the structure is located within the setback zone prescribed by The Water Code, then the permit cannot be granted, otherwise it is in direct violation of the law. In the foreshore areas, in accordance with the conditions set by the DENR, any structure that is built thereon the foreshore should not be of a type that can be used to claim exclusive rights or prevent similar public use of the area. Otherwise, the nature of the foreshore as land of the public domain will be lost, and the exclusive appropriation and use of the same by the lessee will be detrimental to the public's rights.

## **6.0 RECOMMENDATIONS**

### **6.1 In General**

There is a need for a Shoreline Management Policy document outlining the general principles and guidelines for the management and use of the foreshore and shore lands, strengthening the primary objective of government to be rational and sustainable management of resources, not mere disposition and alienation. The Constitutional provisions on the National Economy and Patrimony have clearly laid down the rule that government's primary role with respect to natural resources is control their utilization and development, and thus ensure that their benefits are actually reserved for and accrue to all

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<sup>115</sup> For example, in 1954 the Government of Jamaica undertook a study of the use of the beaches and foreshore areas on account of public agitation from small fishermen and the public who found themselves being squeezed out of the beaches by uncontrolled shoreline development. The study resulted in the formulation and enactment of the Beach Control Act in 1956 which, among others, sought to ensure public access and use of the beach and foreshore areas. The Act is presently administered by the National Resource Conservation Authority (NRCA) of Jamaica. For complete and detailed information, see the website of the NRCA at [www.nrca.org/CZM/Beach%20policy/contents.htm](http://www.nrca.org/CZM/Beach%20policy/contents.htm).

Filipinos. The laws remaining in force provide additional specific principles that must be provide overarching guidance to all activities utilizing the foreshore and shore lands.

A Shoreline Management Policy document is a first step towards reorienting the government's agencies, particularly DENR and the LGUs, from utilitarianism and exploitation, towards proper conservation and management. It should be an integral part of a broader Coastal Resource Management Policy document that defines the comprehensive framework of the State towards the fragile coastal ecosystems of the country.

Drawing upon already existing norms of law, the central principles that form the foundation of the Shoreline Management Policy document should be the following:

The foreshore, lands of the public domain, and the natural resources contained therein, which are located on the margins of the coast shall not be alienated or disposed of.

Private lands and property located on the margins of the coast may be validly subjected to special regulation by the State in order to ensure public safety and protect the shoreline from the deleterious natural processes in the coastal environment such as, but not limited to, coastal erosion, storm surges, and sea level rise.

Equal and equitable public access to and from the foreshore and adjacent beaches and shore lands, as well as across the shore, shall be assured through the observance and enforcement of easements of rights-of-way.

Legal restrictions on construction of structures along the shore, particularly the setback requirements mandated by law, shall be strictly observed and enforced by all government agencies having jurisdiction over the said area or structures thereon.

1. Undeveloped coastal frontage are considered as highly valuable areas on account of their aesthetic appeal, naturally protective characteristics, support for livelihoods of coastal communities, environmental benefits, public utility, and recreational use.

Structures presently existing on the shore lands or foreshore areas shall be gradually reduced, through non-renewal of foreshore leases or zoning restrictions.

To complement and implement such basic principles, the following objectives should be clearly stated:

The DENR shall prevent any further diminution of the foreshore lands and other lands of the public domain along the coast, and shall not dispose of the same in favor of private persons or entities, and instead concentrate on maximizing resource rents from already existing uses or in areas disposed of prior to 1987.

The DENR shall take all actions necessary to actively manage activities using the shoreline and any of its natural resources, and in particular, ensure that the terms and conditions of existing Foreshore Lease Contracts are strictly complied with, and that the State receives the most benefits from the use of the limited foreshore and shore land areas.

The DENR shall ensure that the State receives resource rents appropriate for the corresponding value of the areas presently under existing Foreshore Lease Contracts, and to this end shall modify or revise existing contracts.

Local government units shall actively regulate the construction and maintenance of residences, buildings, and other structures, both public and private in nature, within and adjacent to the foreshore and shore lands for the purpose of ensuring public access and protecting public safety.

Local government units shall ensure strict observance and implementation of the terms and conditions under which specific areas of the foreshore or shore lands of the public domain were permitted to be utilized by private persons and entities.

The HLURB shall provide guidance and regulatory control over all building and construction activities in the foreshore and shore lands through appropriate national standards for such structures.

All agencies of government shall observe and implement shoreline setback zones provided for by law. Local government units, through appropriate zoning ordinances, may supplement such setback zones with additional safety zones and building restrictions as may be needed depending on local conditions.

## **6.2 Specific Actions and Activities**

In light of the foregoing discussion, the following policy initiatives or actions are recommended for each of the concerned agencies:

### **6.3 Local Government Units**

Enact comprehensive land use plans and zoning ordinances for the municipality or city, or amendments thereto, which:

- a) prohibit the issuance of permits to build or construct any type of structures within the setback zones prescribed by The Water Code;
- b) require existing all existing structure-owners to provide for public access to/from and across the shore through their landholdings located on the shore lands or foreshore;
- c) prohibit the issuance of permits to build or construct any type of structure on cliff-edges, faces or slopes;
- d) prohibit the issuance of permits to build or construct any type of structure on the foreshore areas in a manner which impairs or nullifies the setback zones for the adjacent shore lands.

Enact municipal ordinances requiring existing foreshore lessees or shore land occupants to respect public rights to the foreshore and shore lands (particularly the beaches), and in this respect to:

- a) require foreshore lessees to strictly comply with the terms and conditions of Foreshore Lease Agreements, particularly to respect all easements in favor of the public;
- b) prohibit the construction of structures such as buildings or fences along or across the shore lands and foreshore, including the beaches, which impede public access or prevent the exercise of the public's right of way in those areas;
- c) declaring as public nuisances all such structures which unduly impede the public's right of access to/from or across the shoreline;
- d) require shore land occupants and foreshore lessees to remove such obstructions to the public's right of way within a specific period;
- e) require shore land occupants to vacate the areas or demolish structures within the areas covered by the setback zones under The Water Code within a specific period;
- f) authorize the Municipal Mayor to undertake the removal of obstructions or demolition of structures within the setback zones after the period given for voluntary removal or demolition has elapsed.

Enact municipal ordinances regulating the use of existing structures on the shore lands and foreshore authorized under previous Foreshore Lease Contracts, with the end in view of discouraging further expansion of such structures; discouraging renewal of the terms of their occupation under whatever contract; and preventing public dangers or inconveniences.

Enact a municipal ordinance prohibiting any further diminution of their remaining unoccupied shore lands or foreshore areas to the prejudice of the inhabitants, and to this end:

- a) require the municipal or city engineer to undertake an inventory of the municipal or city coastline and determine the extent to which it is occupied, the types of structures that are located therein, and the possible dangers or inconveniences that they create;
- b) declare that the remaining open shore lands and foreshore areas are to be reserved for the public use and open access, and are not to be exclusively appropriated by any one person or entity;
- c) declare that the municipality or city disapproves of any pending or future application for Foreshore Lease Contract within its territorial jurisdiction;
- d) declare that the municipality or city shall strictly enforce the setback zones mandated by the law; and
- e) issue a corresponding municipal resolution transmitting the same to the DENR for guidance.

Issue a municipal resolution authorizing the Municipal Mayor, acting on behalf of the municipality or city, to make all necessary representations and take action for the

cancellation or rescission of Foreshore Lease Contracts in favor of persons or entities who continue to violate the terms and conditions thereof, particularly those who deny public access to/from or across the shore covered by such contracts.

Enact an ordinance prohibiting the construction of or requiring the demolition of any coastal structure, other than those impeding public access, which tend to accelerate coastal erosion including unauthorized and improperly designed or located jetties, revetments, seawalls, wharves, causeways, and the like; this however, should be subject to a verification or validation procedure to determine whether or not such structure is indeed aggravating coastal erosion or might be preventing it.

Include in their local development plans a component for development and management of the municipality's or city's shoreline, particularly to control the rate of development and utilization of the shoreline for economic purposes.

Include in their coastal resource management plans (if any) a component on management of the shore lands and foreshore, with particular emphasis on implementation of setback zones and ensuring public access through the shore lands and foreshore.

Enact a provincial ordinance absolutely prohibiting the issuance of permits for quarrying of sand and gravel or other materials from the foreshore, and placing quarrying activities on the beaches and adjacent shore lands under strict supervision and controls.

#### **6.4 Housing and Land Use Regulatory Board**

Issue a memorandum/circular directing all coastal municipalities and cities to clearly include and consider the shore land and foreshore areas under their land classification and land-use planning activities, with the end in view of ensuring implementation of the setback zones under The Water Code, and providing for minimum safe distances from the sea for location of buildings or other structures.

Issue a memorandum/circular to all coastal municipalities and cities prescribing standards for construction of any improvements in the shore lands, for the purpose of ensuring adequate safeguards against coastal erosion, guaranteeing respect for the public's right of access to/from the shore, and durability against the elements whose impacts have heightened intensity in the coastal areas. This may include setback or restricted building zones supplemental to those prescribed under The Water Code.

Issue a memorandum/circular to all coastal municipalities and cities allowing them to submit revisions or modifications to any previously approved comprehensive land use plans or zoning ordinances for the purpose of implementing the setback zones, ensuring easements for public access, and regulating foreshore activities and structures.

## **6.5 Department of Public Works and Highways**

Issue a memorandum/circular to all its regional or district offices reminding that the setback zones under The Water Code are to be observed in the decision-making on applications for permits to construct improvements on shore lands of the public domain or on the foreshore.

Issue a memorandum/circular requiring all occupants located within the setback zones adjacent to coastal roads or highways, or within the easement zones appurtenant to such roads and highways, to vacate the premises within a specified period, beyond which they may be subject to demolition.

Issue notices to all private persons or entities who are undertaking coastal works (building seawalls, jetties, etc.) reminding them that such works are unauthorized and subject to the jurisdiction and control of the DPWH exclusively, and requiring them to cease and desist from continuing such works.

Issue a memorandum/circular to all regional or district offices authorizing them to demolish any unauthorized coastal structures that are found to be accelerating coastal erosion rates and endangering or damaging public infrastructure such as coastal roads and bridges.

## **6.6 Department of Environment and Natural Resources**

Issue a memorandum to all CENROs, PENROs, and Regional Directors advising that:

- i) the DENR shall no longer entertain any applications for Foreshore Lease Contracts in view of the constitutional prohibition against such mode of disposition of foreshore lands;
- ii) all pending applications for Foreshore Lease Contracts, and applications for temporary permits to occupy the lands under application, are to be denied;
- iii) only existing Foreshore Lease Contracts approved prior to 1987 are to be permitted to continue in effect, but subject to such modifications and amendments as may be imposed in view of the constitutional proscription.

Issue notices requiring existing lessees with existing Foreshore Lease Contracts to comply strictly with the terms and conditions contained in the contract, particularly those which provide for public access through easements of rights of way, with the directive to remove any obstructions to such access, under penalty of rescission or revocation of the Foreshore Lease Contract.

Issue a memorandum to all CENROs to undertake a review of all existing Foreshore Lease Contracts and verification of whether the lessees are complying strictly with the terms and conditions thereof, particularly those referring to public rights which were reserved by the easement provisions; and in case violations are found, to undertake remedial actions to either impose compliance by the lessee or initiate revocation of the contract.

Issue administrative guidelines on the application of the Environmental Impact Statements System to foreshore and shore land activities, including foreshore leases and quarrying activities, as mandated by the Fisheries Code of 1998.

Issue a memorandum to all CENROs requiring them to submit to the DENR within 90 days a rapid inventory report of the shoreline under their jurisdiction, containing information regarding the length of the shoreline, the extent to which it is occupied, the extent to which such occupation is legally authorized by Foreshore Lease Contracts or other documents, and the extent to which such occupation is illegal for being a mere detainer of public domain. Such information should be presented in the aggregate and segregated per municipality or city.

On the basis of the inventory reports above, formulate a Shoreline Management Policy document that will provide general guidelines and guiding principles for the long-term regarding the management of public lands located on the shores of the country, as well as to provide guidance to municipalities and cities in the management of lands located on the shores under their jurisdiction

With the foregoing recommendations, it is hoped that a process may be initiated through which the occupation, use, and exploitation of the foreshore and shore land spaces of the country can be brought under more effective control and management in the near future.

## 7.0 Conclusion

The management for the foreshore and shore land spaces of the country have primarily become the responsibility of the local government units which exercise extensive regulatory powers over the activities that take place and the structures that can be built upon them. Historically, the actual management of these areas have been neglected by the national government on account of the fact that the powers and functions exercised by national agencies have centered around alienation and disposition, not actual monitoring and regulation of the use of these public lands once they have been disposed of. The continued implementation of the provisions of The Public Land Act to this date, despite the overriding influence of the 1987 Constitution which limits the modes of utilization of the country's resources and precludes the traditional modes that were provided for under the previous law, is indicative of this neglect. Presently, the concerns expressed by local government units and residents regarding the apparently uncontrolled use and occupation of the coast are but logical responses to the effects of continued neglect. It is but proper, therefore, that the extensive powers and functions now available to the local government units, in coordination with the mandated support functions assigned to national government agencies, be exercised to ensure that the shoreline of the country does not vanish under uncontrolled coastal development.